

IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF SOUTH CAROLINA

2009 SEP 11 P 12:08

Judy Crane,

Plaintiff,

v.

Secretary of Health and
Human Services,

Defendant.

) Civil Action No. 9:09-0929-CMC-BM
)
)
)
)

**REPORT AND RECOMMENDATION
AND
ORDER**

This is a social security matter which has been filed by the Plaintiff, pursuant to Title 42 U.S.C. § 405(g). The file reflects that the Complaint was filed on April 13, 2009, and the summons was issued on April 13, 2009.

There is no evidence in the file that the Defendant has ever been served with process in this case. Pursuant to Rule 4(m), Fed.R.Civ.P., "[i]f service of the summons and complaint is not made upon a defendant within one hundred and twenty (120) days after the filing of the complaint, the Court, upon motion or on its own initiative after notice to the Plaintiff, shall dismiss the action without prejudice as to that Defendant...provided that if the Plaintiff shows good cause for the failure, the Court shall extend the time for service for an appropriate period."

Here, the time for service began to run on April 13, 2009, and the one hundred and twenty (120) day period for service provided by Rule expired on August 14, 2009. Therefore, unless Plaintiff has made proper service on the Defendant, this case is subject to dismissal. **Plaintiff is herein specifically advised and placed on notice that, in response to this Report and**

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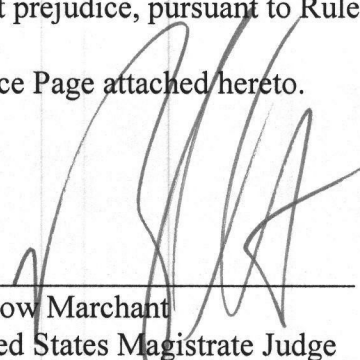
Recommendation, he is to provide the Court with proof of service on the Defendant, or present good cause to the Court for any failure to serve the Defendant, within ten (10) days of the filing of this Report and Recommendation. Failure to do so will result in this case being dismissed.

Conclusion

If in response to this Report and Recommendation, Plaintiff submits to the Court proof of timely service on the Defendant, then in that event **IT IS ORDERED** that this Report and Recommendation be **vacated**, and that the file be returned to the undersigned for further proceedings.

In the event Plaintiff fails to submit to the Court proof of service on the Defendant, or to demonstrate good cause for having failed to do so,¹ within the time granted herein, it is recommended that this case be **dismissed**, without prejudice, pursuant to Rule 4(m), Fed.R.Civ.P.

The parties are referred to the Notice Page attached hereto.



Bristow Marchant
United States Magistrate Judge

September 10, 2009
Charleston, South Carolina

¹In the event Plaintiff has failed to serve the Defendant with service of process, but submits material to the Court asserting good cause for such failure, whether or not to accept Plaintiff's assertions of good cause shall be in the sole discretion of the District Judge in his review of this Report and Recommendation. See e.g., Epstein v. White, 1991 U.S. Dist. LEXIS 14888, 1991 WESTLAW 214152 (N.D.Ill., October 18, 1991); and cf. Mid-Continent Wood Products, Inc., v. Harris, 936 F.2d 297, 1991 U.S. App. LEXIS 13888 (7th Cir. 1991) [Case law interpreting Rule 4(m) [or its predecessor, Rule 4(j)] has uniformly held that dismissal is mandatory if the defendants are not served within 120 days unless good cause is shown.].

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Court Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. In the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must "only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005).

Specific written objections must be filed within ten (10) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). The time calculation of this ten-day period excludes weekends and holidays and provides for an additional three (3) days for filing by mail. Fed. R. Civ. P. 6(a) & (e). Filing by mail pursuant to Fed. R. Civ. P. 5 may be accomplished by mailing objections to:

Larry W. Propes, Clerk
United States District Court
P.O. Box 835
Charleston, South Carolina 29402

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985).